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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALCOA, INC., Plaintiff and Appellant, v. CALIFORNIA CARTAGE COMPANY, INC., Defendant and Respondent.	E032819 (Super.Ct.No. SCV 62817) OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the Mun. Ct. for the Los Angeles Southeast Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Carlson, Messer & Turner and Charles R. Messer for Plaintiff and Appellant.

Sands Lerner, Donald J. Sands and Joseph Cho for Defendant and Respondent.

1. Introduction

Plaintiff Alcoa, Inc., who manufactured and sold aluminum products, contracted with defendant California Cartage Company, Inc., for warehousing services. After a fire at defendant's warehouse ruined plaintiff's goods, plaintiff sued defendant for damages.

The jury found defendant negligent and the court awarded plaintiff $1,000,000, the contractual limit on defendant's liability. Plaintiff then filed motions for prejudgment interest and attorney fees. Based on the limitation of liability provision, the trial court denied plaintiff's motions. The sole issue on appeal is whether the trial court erred in denying plaintiff's motion for prejudgment interest and attorney fees.

In affirming the trial court's judgment, we conclude that a court may not award prejudgment interest in addition to the other elements of damages in excess of the contractual limit. We also conclude that the provision referring to attorney fees was an indemnification clause pertaining to third party claims, rather than an attorney fees provision allowing an award of fees in an action between the parties under the contract.

2. Factual and Procedural History

On July 17, 1995, plaintiff, who was in the business of manufacturing and selling aluminum alloy sheeting products or "coils," entered into a contract with defendant for certain warehousing services.[1] On December 16, 1996, there was a fire at defendant's warehouse, where defendant stored plaintiff's aluminum coils. The fire or smoke damaged the coils.

[1] Plaintiff's motion to strike portions of defendant's brief is denied. Although defendant failed to provide citations to support each fact or reference to the record, because of the minimal record on appeal, we exercise our discretion to disregard defendant's noncompliance under California Rules of Court, rule 14(e). *Cruze v. National Psychiatric Services, Inc*. (2003) 105 Cal.App.4th 48, 50, footnote 4.

On December 10, 1999, plaintiff filed a complaint alleging that defendant's negligence caused approximately $1,621,030 in damages to plaintiff's property. At trial, however, plaintiff presented evidence that it had submitted to defendant several claims totaling $1,916,000. The claims primarily reflected the difference between the invoice prices and the scrap values for the damaged coils.

Based on the limitation of liability provision of the warehousing contract, the parties stipulated that the total damages would not exceed $1,000,000. The jury found that defendant's negligence caused plaintiff $1,916,000 in property damage. Based on the parties' stipulation, the trial court reduced the amount to $1,000,000.

On August 21, 2002, plaintiff filed two separate motions: one for attorney fees and costs in the amount of $511,322, and another for prejudgment interest in the amount of $769,445. Relying again on the limitation of liability provision, the trial court denied both motions.

The court entered judgment for $1,000,000 plus $74,535.16 in costs and post-judgment interest.

In appealing from the judgment, plaintiff challenges only the trial court's denial of its motions for attorney fees and prejudgment interest.

3. Appealability

As a preliminary matter, defendant claims that plaintiff is barred from appealing the court's judgment because it voluntarily accepted defendant's payment of $1,000,000 plus the amount for postjudgment interest. Defendant's payment did not include the

amount awarded for costs because, at the time defendant issued its checks, it had not yet received notice of the cost award.

In support of its claim, defendant relies on *Schubert v. Reich*.[2] In *Schubert*, the court observed that, "[i]t is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom."

Defendant's claim lacks merit. We initially note that defendant's claim is procedurally defective because defendant failed to submit a formal, written motion for dismissal.[3] Defendant's claim is also substantively flawed because plaintiff's appeal does not involve the court's judgment as to the amount of damages and the post-judgment interest. Plaintiff is challenging the court's judgment only as to the denial of its motions for pre-judgment interest and attorney fees. The record in no way suggests that plaintiff's acceptance of defendant's checks constituted an unmistakable acquiescence of the court's ruling on these two issues.[4]

"Furthermore, where the benefits accepted are those to which the appellant would be entitled even in the event of reversal, acceptance thereof does not bar prosecution of the appeal. [Citations.] Thus, '[i]f the appeal is only from a portion of a judgment in

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[2] *Schubert v. Reich* (1950) 36 Cal.2d 298, 299.

[3] See *American Alternative Energy Partners II v. Windridge, Inc*. (1996) 42 Cal.App.4th 551, 557.

[4] See *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 744; *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 86.

which the issues are severable, the portions from which no appeal is taken may become final and beyond the scope of review of the appellate court [citations]; and so where the judgment clearly establishes the appellant's right to recover but the amount is less than he demands, he may accept it and nevertheless appeal, claiming the larger recovery. [Citations.]' [Citation.]"[5]

Regardless of the outcome of this appeal, plaintiff was entitled to defendant's initial payment on the judgment. In addition to the amounts received, plaintiff is seeking over $1,200,000 in prejudgment interest and attorney fees. The court's post-judgment rulings on plaintiff's motions are severable and independently appealable.[6]

For these reasons, we reject defendant's claim and proceed with plaintiff's appeal.

4. The Contract and the Rules of Interpretation

The parties entered into a contract for warehousing services. In regards to the issues raised in this appeal, the parties disagree as to the interpretation of one particular provision within the contract, namely, paragraph 15. That provision reads as follows:

"Depositor agrees to bear risk of and responsibility for loss or damage to the goods excepting loss or damage which results from intentional, wanton, reckless or negligent acts of Warehouseman, its agents or employees. Where Warehouseman is

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[5] *In re Marriage of Fonstein, supra*, 17 Cal.3d at page 744; see also *Furlough v. Transamerica Ins. Co*. (1988) 203 Cal.App.3d 40, 44-45.

[6] See Code of Civil Procedure sections 904.1 and 906; *R. P. Richards, Inc. v. Chartered Const. Corp.* (2000) 83 Cal.App.4th 146, 158; *In re Marriage of Levine* (1994) 28 Cal.App.4th 585, 588-589.

responsible for such loss or damage, Warehouseman's liability shall be limited to $1,000,000.

"Warehouseman shall indemnify and hold Depositor harmless from and against and shall at its own expense defend, any and all actions based on, and pay all charges of attorneys and all costs and other expenses arising from all fines, penalties, loss, liability, claims, suits or demands of every kind on account of injury (including death) to any person or persons, loss or damage to property of others (including employees and invitees of Depositor and/or other companies), violation of laws, rules or regulations caused by, arising out of or in any ways associated with Warehouseman's negligence related to the performance of this Agreement, including but not limited to the handling, storing, packing, labeling and shipping of the goods. Warehouseman agrees to cover his responsibilities under this Paragraph 15 by maintaining general liability insurance with a single limit of not less than $1,000,000 per occurrence. A certificate of said insurance coverage shall be provided to ALCOA with a thirty-day notification clause of prior cancellation."

In general, de novo review applies to contract interpretation when the analysis revolves entirely around the terms of the contract without reference to extrinsic evidence.[7]

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[7] See *Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.

In construing the various terms in this provision, we apply well-settled rules. "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.]"[8] If, however, the language is ambiguous or uncertain, we interpret the contract against the party who caused the uncertainty.[9] We define the terms of the agreement according to the ordinary and popular sense of the words, unless the words are used in a technical sense.[10] We interpret the terms in context by considering the contract as a whole and giving effect to every part of the agreement.[11]

5. Prejudgment Interest

Plaintiff argues that it was entitled to prejudgment interest under Civil Code section 3287, subdivision (a), and the limitation of liability clause of paragraph 15 did not preclude recovery.

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[8] *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.

[9] Civil Code section 1654; see *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1184; *People v. Ranger Ins. Co*. (1998) 61 Cal.App.4th 812, 816.

[10] *Stamm Theatres, Inc. v. Hartford Casualty Ins. Co.* (2001) 93 Cal.App.4th 531, 538.

[11] *Stamm Theatres, Inc. v. Hartford Casualty Ins. Co., supra*, 93 Cal.App.4th at page 538.

Civil Code section 3287, subdivision (a), provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

The requirement of certainty is satisfied if the amount of damages was readily ascertainable by mathematical calculation.[12] """The test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether *defendant* actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount. [Citation.]" [Citations.] "The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, 'depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor.' [Citations.]"

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[12] *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 772-773, citing *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1307.

[Citation.] Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate. [Citation.]' [Citation.]"[13]

In the case, *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.*,[14] the court determined whether one insurer, Hartford Accident & Indemnity Company (Hartford), was entitled to prejudgment interest from an excess insurer, Transamerica Insurance Company (Transamerica). Transamerica claimed that dispute between the two insurers was not only over liability, but also over the nature and extent of any recovery under Hartford's policy. The case turned on the trial court's designation of the primary and excess insurance policies and the division of liability among the excess insurers. Transamerica argued, therefore, that the amount of liability remained unresolved until judgment.

Rejecting Transamerica's argument, the appellate court held that the recoverable amount of damages was certain or capable of being made certain by calculation.[15] The court reasoned as follows: "Assuming Hartford was entitled to recover damages, the only question remaining was how the trial court would prioritize the policies. In this respect, the trial court had only two options: (1) to hold, as it did, that the Sequoia policy

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[13] *Children's Hospital and Medical Center v. Bonta, supra*, 97 Cal.App.4th at page 774; see also *Stein v. Southern Cal. Edison Co*. (1992) 7 Cal.App.4th 565, 573.

[14] *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co., supra*, 211 Cal.App.3d 1285.

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was second in order and that the Hartford and Transamerica policies share the excess liability on a prorata basis, or (2) that the Hartford Umbrella policy and the combined limits of the Sequoia and Transamerica policies be prorated. This was purely a question of law since the amount of damages under either formula was readily ascertainable by mathematical calculation. Thus, the amount of damages was never 'unliquidated' or 'contingent' but rather, only the legally proper order of priority of the respective policies was uncertain. Under these circumstances, Hartford is entitled to prejudgment interest."[16]

In this case, although the dispute between the parties concerned issues of liability, including application of the limitation of liability clause, the amount of damages, whether based on either the amount specified under paragraph 15 or the actual amount calculated from the loss or damage claims invoices, was certain or capable of being made certain by calculation. Paragraph 15 plainly stated that defendant's liability was limited to $1,000,000. Plaintiff's claim invoices provide a complete record of the actual damages.[17] In March of 1997, plaintiff sent defendant three invoices claiming a total of $2,369,023.15. Plaintiff also sent two invoices reflecting the amount deducted from the

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[15] *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co., supra*, 211 Cal.App.3d at page 1307.

[16] *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co., supra*, 211 Cal.App.3d at page 1307.

[17] See *Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1789.

total claim based on customer discounts. That amount was $452,625.47. Plaintiff's actual damages were $1,916,397.68, which was easily ascertained by subtracting the total deductions ($452,625.47) from the total claim ($2,369,023.15). As noted by plaintiff, defendant never disputed the amounts claimed on these invoices. The uncertainty was not in calculating the amount of damages, but whether liability would be limited by the terms of the contract.

Therefore, even if plaintiff satisfies the requirement of certainty under Civil Code section 3287,[18] plaintiff must still overcome the hurdle presented by the limitation of liability provision.

6. Limitation of Liability

Plaintiff argues that paragraph 15 pertains only to items that fall within the categories of "loss or damage" to the goods. Plaintiff contends that prejudgment interest does not fall within these categories, but instead provides compensation for loss of use. Plaintiff also contends that the limitation of liability provision should not be applied to require plaintiff to wait years before recovering only the amount of the contractual limit.

At trial, plaintiff submitted a copy of a standard commercial liability insurance policy. The policy includes supplemental coverage for prejudgment interest even beyond the policy limit.

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[18] But see *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 435-436 (discrepancy between amount on complaint and final judgment); *Stein v. Southern Cal.*

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Defendant argues that, based on the terms of paragraph 15, its total liability was limited to $1,000,000. If the parties intended otherwise, defendant notes, the parties could have so specified in the limitation of liability or the insurance provisions. Defendant also argues that, based on the ordinary and popular meaning of the term "liability," paragraph 15 covers all items of damages resulting from defendant's negligence, including prejudgment interest or compensation for loss of use.

The question in this case is whether a party may recover prejudgment interest that, when combined with the other elements of damages, exceeds the contractual limitation of liability.

Other jurisdictions have addressed this issue with varying results.[19] The rule in the majority of jurisdictions is that a party may not recover prejudgment interest beyond the contractual limit.[20] A minority of states, however, has adopted the contrary rule that

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Edison Co., supra, 7 Cal.App.4th at page 573 (discrepancy between claimed amount and final judgment).

[19] See generally Annotation, Liability of Insurer for Prejudgment Interest in Excess of Policy Limits for Covered Loss (1994) 23 A.L.R.5th 75.

[20] See *Bowron v. Georgia Casualty Co.* (D.C. Ala. 1915) 223 F. 673, 677; *Guin v. Ha* (Alaska 1979) 591 P.2d 1281, 1287; *Allstate Ins. Co. v. Starke* (Colo. 1990) 797 P.2d 14, 20-21; *Steelmet, Inc. v. Caribe Towing Corp* (11th Cir. Fla. 1988) 842 F.2d 1237, 1244; *Farm Bureau Mut. Ins. Co. v. Milne* (Iowa 1988) 424 N.W.2d 422, 426; *Fowler v. Roberts* (La.App.2d Cir. 1988) 526 So.2d 266, 281; *Nunez v. Nationwide Mut. Ins. Co*. (Me. 1984) 472 A.2d 1383, 1384-1385; *Lessard v. Milwaukee Ins. Co*. (Minn. 1994) 514 N.W.2d 556, 559; *Laplant v. Aetna Casualty & Surety Co*. (1966) 107 N.H. 183, 185-186; *Ashkenazy v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (1997) 665 N.Y.S.2d 99, 100; *Sproles v. Greene* (1991) 329 N.C. 603, 611-612; *Phoenix Phase I Associates v.*
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prejudgment interest may be allowed despite the policy limits.[21] Courts often arrive at the minority rule based on the public policy rationale of discouraging delayed compensation and encouraging prompt settlement.[22]

Some courts have decided this issue on the grounds of other overriding considerations. For instance, if the contract provides that prejudgment interest will or will not be covered, the court will give effect to the parties' intent.[23] In other instances, if the state Legislature has adopted statutes that, under certain circumstances, require the payment of prejudgment interest in addition to any other damages, the courts will defer to the Legislature.[24]

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Ginsberg, Guren & Merritt (1985) 23 Ohio App.3d 1, 5; *Carney v. State Farm Mut. Auto. Ins. Co*. (Okla. 1994) 877 P.2d 1113, 1119; *Allstate Ins. Co. v. Pogorilich* (RI 1992) 605 A.2d 1318, 1321; *Runge v. Prairie States Ins.* (SD 1986) 393 N.W.2d 538, 542; *Nielsen v. O'Reilly* (Utah 1992) 848 P.2d 664, 670; *Dairyland Ins. Co. v. Douthat* (1994) 248 Va. 627, 632; *Buckhannon-Upshur County Airport Auth. v. R & R Coal Contracting Inc*. (1991) 186 W.Va. 583, 587, 590.

[21] *Martin v. Champion Ins. Co.* (La. 1995) 656 So.2d 991, 995-996; *Burford Equipment Co., Inc. v. Centennial Ins. Co.* (MD 1994) 857 F.Supp. 1499, 1506; *Denham v. Bedford* (1980) 407 Mich. 517; *Jones v. Bennett* (1998) 306 N.J. Super. 476, 486-488; *Myers et al. v. M. Buten & Sons, Inc. et al*. (1981) 6 Phila. Co. Rptr. 633, 641-642; *Cavnar v. Quality Control Parking, Inc., et al*. (Tex. 1985) 696 S.W.2d 549.

[22] See, e.g., *Denham v. Bedford, supra*, 407 Mich. at pages 523, 536.

[23] See, e.g., *Tucker v. United States Auto. Assn*. (Alaska 1992) 827 P.2d 440, 441-442; *Adler v. American Nat. Property and Cas. Co*. (La. 2000) 769 So.2d 698, 702-703; *Lowe v. Tarble* (1985) 313 N.C. 460, 464.

[24] See, e.g., *Hughes v. Harrelson* (Alaska 1993) 844 P.2d 1106, 1108; *McGoff v. AMCO Ins. Co*. (Minn. 1998) 575 N.W.2d 118, 119-120; *Woodhams v. Moore* (Ohio

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At least two jurisdictions have vacillated on this issue.[25] Ultimately, however, courts in these jurisdictions, along with courts in most jurisdictions, have resolved the matter by categorizing prejudgment interest as damages that are subject to contractual provisions limiting damages.[26]

In a leading minority case, *Denham v. Bedford*, the court regarded prejudgment interest as indistinguishable from postjudgment interest and other costs incurred in prosecuting an action.[27] Relying on public policy, the court reasoned: "Payment of prejudgment interest not only compensates the prevailing party but also liability for prejudgment interest may act as an incentive to the insurer to promptly settle a meritorious claim. Without such an incentive, the insurer may refuse to settle a meritorious claim in hopes of forcing plaintiff to settle for less than the claim's true value. The insurer risks nothing. Even if protracted litigation results, the insurer will only be liable for its policy limits all the while reaping a tidy sum from its investment of the

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1994) 840 F.Supp. 517, 520; *Armacost v. Amica Mut. Ins. Co*. (RI 1993) 11 F.3d 267, 271.

[25] See, e.g., *Carney v. State Farm Mut. Auto. Ins. Co., supra*, 877 P.2d 1113, 1119, overruling *Phillips v. State Farm. Mut. Auto. Ins. Co*. (Okla. 1993) 848 P.2d 70; *Allstate Ins. Co. v. Allen* (Colo. 1990) 797 P.2d 46, 49, overruling *Bjorkman v. Steenrod* (Colo. 1988) 762 P.2d 706.

[26] See, e.g., *Carney v. State Farm Mut. Auto. Ins. Co., supra*, 877 P.2d at pages 1118-1119; *Allstate Ins. Co. v. Allen, supra*, 797 P.2d at page 49-50; see also footnote 19 *supra*.

[27] *Denham v. Bedford*, *supra*, 407 Mich. at pages 533-535.

policy limits."[28] The court concluded that a party's statutory right to prejudgment interest should prevail even in cases where the award for such interest would exceed the policy limits of an insurance contract.[29]

Other courts have rejected *Denham*'s analysis and conclusion.[30] Specifically, other jurisdictions have questioned the *Denham* court's policy discussion. They note that the *Denham* court failed to recognize the insurer's risk of liability for violating the covenant of good faith and fair dealing in settling meritorious cases.[31]

In the leading case advancing the majority view, *Guin v. Ha*,[32] the court addressed the question of whether a medical malpractice insurer was liable for prejudgment interest beyond the limitation of liability provision of the insurance policy. In considering the terms of the contract, the court noted that, while the contract included a supplemental payment clause for costs and expenses incurred to defend the insured, the contract

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[28] *Denham v. Bedford, supra*, 407 Mich. at page 536.

[29] *Denham v. Bedford, supra*, 407 Mich. at pages 534-535, 537.

[30] See, e.g., *Carney v. State Farm Mutual Automobile Ins. Co., supra*, 877 P.2d at page 1116; *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, supra*, 186 W.Va. at page 589; *Lessard v. Milwaukee Ins. Co* (Minn. 1993) 496 N.W.2d 852, 856-857.

[31] See, e.g., *Farm Bureau Mut. Ins. Co. v. Milne, supra*, 424 N.W.2d at page 425.

[32] *Guin v. Ha, supra,* 591 P.2d 1281.

contained no provision obligating the insurer to pay prejudgment interest.[33] The court noted that prejudgment interest was not a litigation cost or expense.[34]

In addressing the specific issue of whether prejudgment interest was an item of damages as used in the limitation of liability clause, the Alaskan court relied on its own precedent and cases from other jurisdictions to hold that prejudgment interest was in the nature of compensatory damages.[35] In particular, the court relied on an earlier case that held that prejudgment interest compensated the plaintiff for depriving him of the use of his money for a certain period of time.[36] An award of prejudgment interest, therefore, was necessary to make the plaintiff whole.[37] The court concluded that, when classified as an item of compensatory damages, prejudgment interest falls within the limitation of liability clause of an insurance contract.[38]

The court in *Guin* acknowledged the public policy arguments in favor of holding insurers liable for prejudgment interest. In evaluating one such argument, the court

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[33] *Guin v. Ha, supra*, 391 P.2d at page 1285.

[34] *Guin v. Ha, supra*, 391 P.2d at pages 1285-1286.

[35] *Guin v. Ha, supra*, 391 P.2d at page 1286.

[36] *Guin v. Ha, supra*, 391 P.2d at pages 1286-1287, citing *Davis v. Chism* (1973) 513 P.2d 475, 481.

[37] *Guin v. Ha, supra*, 391 P.2d at page 1287.

[38] *Guin v. Ha, supra*, 391 P.2d at page 1287.

explained that, although economic fairness would suggest that those having the use and benefit of the funds should be held liable for paying interest, this reason does not provide sufficient grounds for restructuring the contractual relationship and, in particular, the allocation of obligations between the parties.[39]

In addressing another public policy argument, the court in *Guin* observed: "Encouraging early settlement where liability is clear is a salutary goal, but it does not require the insurer to bear the burden of a risk it has not assumed."[40] The court also observed that, while encouraging settlement was on one side of the public policy coin, on the other side of the coin was the unwarranted consequence of forcing insurers to acquiesce to a plaintiff's demands early in the proceedings despite any meritorious defense to avoid the risk of paying a large amount in prejudgment interest.[41] The court also noted that if an insurer fails to fulfill its contractual responsibilities, including the responsibility to pursue any reasonable settlement, and insured may recover from the insurer based on the implied covenant of good faith and fair dealing.[42] After reviewing

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[39] *Guin v. Ha, supra*, 391 P.2d at page 1290.

[40] *Guin v. Ha, supra*, 391 P.2d at page 1291.

[41] *Guin v. Ha, supra*, 391 P.2d at page 1291.

[42] *Guin v. Ha, supra*, 391 P.2d at page 1291.

all the public policy arguments, the court ultimately deferred to the contractual language.[43]

California has yet to resolve the issue of whether a party is entitled to prejudgment interest under Civil Code section 3287 when the amount exceeds the contractual limit. Although one California appellate court has come close, that case involved an insurance policy that specifically allowed the insured to recover interest and costs in addition to any award of damages. In that case, *State Farm Mutual Automobile Ins. Co. v. Crane*,[44] the contract provided that State Farm would pay any costs resulting from the accident, including "[i]nterest on all damages owed by an insured as the result of a judgment until we pay, offer or deposit in court the amount due under this coverage."[45]

In that case, the defendant State Farm argued that, because California law treated interest as damages, as opposed to costs, it was not required to pay prejudgment interest beyond the policy limits. In rejecting State Farm's argument, the court, based on a layperson's understanding of the policy language, classified interest as a "cost" under the specific and unambiguous terms of the insurance policy.[46]

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[43] *Guin v. Ha, supra*, 391 P.2d at page 1291.

[44] *State Farm Mut. Auto. Ins. Co. v. Crane* (1990) 217 Cal.App.3d 1127.

[45] *State Farm Mut. Auto. Ins. Co. v. Crane, supra,* 217 Cal.App.3d at page 1132.

[46] *State Farm Mut. Auto. Ins. Co. v. Crane, supra*, 217 Cal.App.3d at page 1132.

In the absence of specific contractual language categorizing interest as a cost of defense, the California courts have been in step with the majority of jurisdictions in treating prejudgment interest as an element of damages. "Interest in that sense if allowable is an element of damages provided by law. The article in the Civil Code incorporating sections 3287-3290 is entitled: 'Interest as Damages.' Section 3287 provides for interest when a contract is involved, and section 3288 deals with interest in actions for breach of obligations not arising from contract. Such interest is in the nature of damages."[47] "For more than a century it has been settled that one purpose of section 3287, and of prejudgment interest in general, is to provide just compensation to the injured party for loss of use of the award during the prejudgment period--in other words, to make the plaintiff whole as of the date of the injury. [Citations.]"[48]

Courts have distinguished such damages from the costs of litigation. "There is an inherent distinction between an award of interest and an award of costs. 'If allowable, interest is an element of damages provided by statute. [Citations.]' [Citation.]"[49] Once

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[47] *Lineman v. Schmid* (1948) 32 Cal.2d 204, 208-209.

[48] *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663-664.

[49] *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 830, footnote 4. The court also noted that a request for prejudgment interest may be made under Code of Civil Procedure section 657 on the grounds of excessive or inadequate damages.

categorized as damages, instead of costs, prejudgment interest may not exceed the limits on damages set by an insurance policy or other contract.[50]

In regards to the public policy arguments, while California courts have recognized the benefit of encouraging settlement,[51] as noted by the court in *Guin*, such benefit must be balanced with the countervailing policy consideration of forcing insurers to settle early despite the existence of a meritorious defense.[52] Furthermore, as noted by the court in *Guin*, the plaintiff is not left without recourse in situations where an insurer acts in bad faith in settling the case or defending the insured.[53]

Moreover, in applying provisions of an insurance policy or other contract, the primary objective is to give effect to the parties' intent. Words in a contract should not be interpreted to bestow benefits or impose risks or obligations upon a party beyond what he or she bargained for or promised.[54] Words also should be interpreted as a layperson

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[50] See *Ledford v. Nationwide Mut. Ins. Co.* (1995) N.C.App. 44, 49-50; *Allstate Ins. Co. v. Starke* (1990) 797 P.2d 14, 20-21*; Carney v. State Farm Mut. Auto. Ins. Co., supra*, 877 P.2d at page 1118-1119; *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc., supra*, 186 W.Va. at page 587.

[51] See *McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1230.

[52] *Guin v. Ha, supra*, 591 P.2d at page 1291.

[53] *Guin v. Ha, supra*, 591 P.2d at page 1291.

[54] See *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1080.

would read them.[55] A layperson would read a limitation of liability provision as limiting liability for all damages, including prejudgment interest. When the contract contains no other provisions governing the payment of interest, prejudgment interest under Civil Code section 3287, as an element of damages, should not exceed the contractual limitation on damages or liability.

In this case, the parties agreed that, if defendant's negligence caused "loss or damage" to plaintiff's property, defendant's liability was limited to $1,000,000. No provision in the contract pertains to prejudgment interest.

We note that, unlike most of the cases discussed above, this case does not directly involve an insurance contract. Nevertheless, while certain policy considerations may not have direct application, they are not altogether irrelevant. The record does not indicate whether defendant in fact purchased a general liability insurance policy as required under the contract. Although plaintiff suggests that defendant may have failed to do so, if defendant was insured, ultimate liability likely would fall on defendant's insurer. Also, by agreeing to cover any loss or damage resulting from its negligence up to the agreed upon limit, defendant essentially stands in the place of an insurer bearing the risk of such loss or damage.

We also note that this case specifically deals with a transaction between a warehouseman/bailer and a depositor/bailee. This transaction, therefore, is governed by

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the Commercial Code. Commercial Code section 7204 provides in part: "Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable . . . ." Under this provision, if the parties enter into an agreement limiting the warehouseman's liability, the warehouseman cannot be held liable for any damages beyond the agreed upon limit.

With these additional considerations in mind, we determine whether defendant should be liable for prejudgment interest in excess of the contractual limit. This case turns on the language of the limitation of liability clause of paragraph 15. As a general rule, limitation of liability provisions are subject to strict construction.[56] Strict construction, however, should not result in arbitrary or unexpected consequences.[57] Rather, the interpretation of such provisions, as with any other contractual terms, should be resolved in a manner consistent with the parties' reasonable expectations.[58]

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[55] See *State Farm Mut. Auto. Ins. Co. v. Crane, supra*, 217 Cal.App.3d at page 1133.

[56] *HIH Marine Ins. Services, Inc. v. Gateway Freight Services* (2002) 96 Cal.App.4th 486, 495.

[57] *HIH Marine Ins. Services, Inc. v. Gateway Freight Services, supra*, 96 Cal.App.4th at page 495.

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Defendant agreed to a $1,000,000 limit on liability for any loss or damage caused by its negligence. Defendant reasonably expected prejudgment interest to be covered under that limit. Upon agreeing to a $1,000,000 limit, it would be unreasonable to impose upon defendant an additional amount of over $700,000 in prejudgment interest.

If plaintiff expected to recover prejudgment interest over and beyond the contractual limitation on liability, plaintiff should have included a specific provision on prejudgment interest. Plaintiff also could have required defendant to obtain additional or supplemental insurance coverage in an amount sufficient to compensate plaintiff for any prejudgment interest.[59] As the party who drafted the contract, plaintiff must bear the consequences of failing to make clear any expectations it had concerning the payment of prejudgment interest.[60] As written, however, the contract does not allow plaintiff to recover any damages, including prejudgment interest, in excess of the contractual limit.

In the absence of any overriding public policy considerations and in the absence of any specific contractual provision requiring otherwise, we conclude that the plaintiff may

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[58] *HIH Marine Ins. Services, Inc. v. Gateway Freight Services, supra*, 96 Cal.App.4th at page 495; see also *Shell Chemical Corp. v. Owl Transfer Co*. (1959) 173 Cal.App.2d Supp. 796, 802-803, quoting 93 Corpus Juris Secundum 457.

[59] See *Guin v. Ha, supra*, 591 P.2d at page 1291.

[60] Civil Code section 1654; see *International Billing Services, Inc. v. Emigh, supra,* 84 Cal.App.4th at page 1184; *People v. Ranger Ins. Co*., *supra*, 61 Cal.App.4th at page 816.

not recover prejudgment interest, when combined with other elements of damages, that exceeds the amount specified in the limitation of liability provision.

We conclude that the trial court properly denied plaintiff's motion for prejudgment interest.

7. Attorney Fees

In also challenging the trial court's denial of its motion for attorney fees, plaintiff argues that the broad language of paragraph 15 authorized an award of attorney fees in a dispute between the parties to the contract.

Defendant responds that paragraph 15 requires the payment of attorney fees only in the context of third party actions. Relying on the contractual language, defendant contends that, while the first subparagraph of paragraph 15 pertains to disputes between the parties, the second subparagraph covers third party actions. Defendant also contends that the attorney fees provision is fatally flawed because it lacks reciprocity by imposing an obligation to pay fees on defendant alone.

As stated earlier in this opinion, de novo review is the appropriate standard for determining whether paragraph 15 operates in this context to allow an award of attorney fees.[61]

Generally, the prevailing party is entitled to recover his costs as a matter of right unless otherwise provided by statute.[62] A party's statutory entitlement to costs includes

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[61] *Whiteside v. Tenet Healthcare Corp*. (2002) 101 Cal.App.4th 693, 707.

attorney fees when authorized by contract, statute, or other law.[63] When authorized by contract, the agreement remains subject to the restrictions and conditions of Civil Code section 1717.

Civil Code section 1717, subdivision (a), provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Civil Code section 1717 was designed to establish mutuality of remedy when the contract allowed recovery for only one party.[64] Under section 1717, both parties are entitled to attorney fees if the contract allows either party to recover attorney fees upon prevailing in an action to enforce the provisions of the contract.[65]

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[62] Code of Civil Procedure section 1032, subdivision (b).

[63] Code of Civil Procedure section 1033.5, subdivision (a)(10); see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.

[64] *Trope v. Katz* (1995) 11 Cal.4th 274, 285; *Reynolds Metal Co. v. Alperson* (1979) 25 Cal.3d 124, 128.

[65] *Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at page 128; see also *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 608.

While reciprocity functions as a matter of law, we must still determine whether paragraph 15 is in fact a unilateral attorney fees provision to which Civil Code section 1717 applies. In addressing this precise issue by considering similar contractual provisions, courts have construed such provisions as indemnity clauses requiring the payment of attorney fees as losses, costs, or expenses incurred in third party actions.[66]

In one particular case, *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (hereafter *Myers*),[67] the property owner entered into a contract with a general contractor to construct an office building. After the subcontractors filed mechanics' liens against the property and subsequently filed lawsuits against the property owner to foreclose on those liens, the owner sued the contractor. The contractor filed a cross-complaint on the basis that the owner made numerous plan changes during the course of construction and failed to compensate the contractor for the additional costs. After prevailing on its claims against the owner, the contractor requested and the court awarded $350,000 in attorney fees.

In *Myers*, the court observed: "Under California law, an '[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.' [Citation.] 'An indemnity against claims, or

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[66] See *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337-1338; *Myers Building Industries, Ltd. v. Interface Technology, Inc*. (1993) 13 Cal.App.4th 949, 973; *Appalachian Ins. Co. v. McDonnell Douglas Corp*. (1989) 214 Cal.App.3d 1, 42-44; *Meininger v. Larwin-Northern California, Inc*. (1976) 63 Cal.App.3d 82, 85.

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demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion . . . .' [Citation.] An indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person. [Citation.]"[68]

Whether a certain provision constitutes an indemnity agreement depends on the language of the contract.[69] "A clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. [Citation.] Indemnification agreements ordinarily relate to third party claims. [Citation.]"[70]

The *Myers* court specifically rejected the argument that Civil Code section 1717 applied to indemnity agreements that provided an award of attorney fees. The court relied on an earlier opinion, *Meininger v. Larwin-Northern California, Inc*. (hereafter *Meininger*).[71] "In *Meininger*, the Court of Appeal concluded that the inclusion of

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[67] *Myers, supra*, 13 Cal.App.4th 949.

[68] *Myers, supra*, 13 Cal.App.4th at page 968.

[69] *Myers, supra*, 13 Cal.App.4th at page 968-969.

[70] *Myers, supra*, 13 Cal.App.4th at page 969.

[71] *Meininger, supra*, 63 Cal.App.3d 82.

attorney fees as an item of loss in a third party claim indemnity provision did not constitute a provision for the award of attorney fees 'in an action on the contract as is required to trigger operation of section 1717 of the Civil Code.' [Citation.]. . . . A provision including attorney fees as an item of loss in an indemnity clause is not a provision for attorney fees in an action to enforce the contract. . . ."[72] The court concluded that section 1717 did not apply to such provisions to make them reciprocal and, thus, applicable to the entire contract.[73] "A contrary conclusion would defeat the purpose of an indemnity agreement. The very essence of an indemnity agreement is that one party hold the other harmless from losses resulting from certain specified circumstances."[74]

In *Myers*, although the relevant provisions included attorney fees as recoverable losses or expenses, the court held that the provisions were standard indemnification clauses. The court held that none of the standard clauses constituted a provision to award attorney fees in an action to enforce the contract.[75]

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[72] *Myers, supra*, 13 Cal.App.4th at page 971.

[73] *Myers, supra*, 13 Cal.App.4th at page 971.

[74] *Myers, supra*, 13 Cal.App.4th at page 973.

[75] *Myers, supra*, 13 Cal.App.4th at page 973.

As stated in *Myers*, the determination of whether a provision constitutes an indemnity clause or an attorney fees provision depends on the particular language of the contract.[76]

The relevant section of paragraph 15 states as follows: "Warehouseman [defendant] shall indemnify and hold Depositor [plaintiff] harmless from and against and shall at its own expense defend, any and all actions based on, and pay all charges of attorneys and all costs and others [*sic*] expenses arising from all fines, penalties, loss, liability, claims, suits or demands of every kind on account of injury (including death) to any person or persons, loss or damage to property of others (including employees and invitees of Depositor and/or other companies), violation of laws, rules or regulations caused by, arising out of or in any way associated with Warehouseman's negligence related to the performance of this Agreement, including but not limited to the handling, storing, packing, labeling and shipping of the goods."

The language of this provision, including the terms "indemnify" and "hold harmless," clearly indicates that this provision is an indemnification clause.[77] Although paragraph 15 includes "charges of attorneys" with the other costs and expenses, the

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[76] *Myers, supra*, 13 Cal.App.4th at pages 968-969; see also *Exxess Electronixx v. Heger Realty Corp*. (1998) 64 Cal.App.4th 698, 708.

[77] *Myers, supra*, 13 Cal.App.4th at page 969.

reference to attorney fees must be considered in the context of the contract as a whole.[78] This sole reference does not alter the nature of the agreement between the parties.

Furthermore, other language in paragraph 15 indicates that the provision was intended to cover third party claims. The contract refers to injury or death to persons, loss or damage to another's property, and the violation of laws, rules and regulations. Paragraph 15 obligates defendant to defend against actions brought by such third party individuals, companies, or governmental entities. The requirement to pay attorney fees, therefore, applies to actions involving third parties, not the contracting parties.[79]

We conclude that, while paragraph 15 contains a third party claims indemnification clause, the contract does not contain an attorney fees provision entitling either party to an award of attorney fees in an action under the contract. Based on this interpretation of paragraph 15, we affirm the trial court's ruling denying plaintiff's motion for attorney fees.

8. Disposition

We affirm the judgment. Defendant shall recover its costs on appeal.

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[78] See *Campbell v. Scripps Bank, supra*, 78 Cal.App.4th at page 1337.

[79] See *Campbell v. Scripps Bank, supra*, 78 Cal.App.4th at page 1337; *Meininger, supra*, 63 Cal.App.3d at page 85.

/s/ Gaut
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ King
J.